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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

ROOTS READY MADE GARMENTS CO.
W.L.L.,

Plaintiff,

v.

THE GAP, INC., a/k/a, GAP, INC., GAP
INTERNATIONAL SALES, INC., BANANA
REPUBLIC, LLC, and OLD NAVY, LLC,

Defendants.

)
)
) Case No. C 07 3363 CRB

) PLAINTIFF'S OPPOSITION TO
) DEFENDANTS' MOTION TO DISMISS
) THE THIRD AMENDED COMPLAINT

)
) Date: May 9, 2008

) Time: 10:00 a.m.

) Place: Courtroom 8, 19th Floor

) Judge: Charles R. Breyer
)
)
)

NY: 585223-5

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SUMMARY OF ARGUMENT

The Third Amended Complaint (“TAC”) demonstrates that the parol evidence rule has no application to Roots’ oral contract or fraud claims. Roots does not claim any rights that are derivative of Gap’s written agreements with Gabana, and therefore does not seek to alter, interpret or modify those agreements. Rather, Roots seeks to enforce its separate oral agreement with Gap. Moreover, the TAC shows that Roots had no control over the negotiation of the written agreements, and never authorized Gap or Gabana to take any action that would prejudice Roots’ rights. Gap cites no precedent permitting a party to a contract to avoid its obligations by unilaterally executing a contract on the same subject matter with a third party.

Even if the parol evidence rule did apply, the TAC shows that Gap-Gabana agreements are consistent with the oral contracts. There is no dispute that Roots was an authorized retailer, and can therefore assert a contract claim based on Gap’s failure to supply first-line merchandise for Roots’ retail stores in Qatar. Moreover, nothing in the Gap-Gabana agreements prohibited Roots from re-selling merchandise to other Gap-approved retailers. Gap’s course of performance under the agreements over a two-year period – and the contemporaneous admission of its own executives – demonstrates that it was the parties’ intent to permit Roots to make such sales. To the extent the written agreements can be interpreted in a manner limiting Roots’ rights – an interpretation Gap never advanced before this lawsuit – Gap is estopped from enforcing them.

Gap’s arguments for dismissal of Roots’ other claims fail, as well. Roots’ Second Amended Complaint (“SAC”) did not “waive” the claim for breach of the covenant of good faith and fair dealing. Rather, Roots’ preserved the claim by incorporating it in the contract counts. Roots’ statutory claim for “unfair” business practices does not require any underlying predicate claim and should be sustained even if Roots’ other claims are dismissed. Roots’ quasi-contract and promissory estoppel claims were filed within the two-year limitations period because the claims did not accrue until August, 2005, when Gap breached its promise to supply Roots with first-line merchandise. Moreover, Gap is equitably estopped from asserting the statute of limitations.

For these reasons, and other explained below, Gap’s motion should be denied.

STATEMENT OF FACTS

This action arises from Defendant Gap, Inc.’s efforts to rid itself of a large inventory of outdated merchandise, know as overproduction, or “OP.” In early 2003, Gap offered to sell the OP inventory to Roots for \$6 million, promising in exchange to grant Roots the right to sell first-line Gap merchandise (i) in Roots’ own retail stores in Qatar, and (ii) to retailers in other territories in the Middle East and North Africa, under Gap’s International Sales Program (“ISP”). *Id.* ¶ 4. In or about May 2003, Roots accepted these terms and entered into an oral agreement with Gap to purchase the OP inventory in exchange for the right to sell ISP merchandise. *Id.* ¶ 50.

In the wake of September 11, Gap did not for public relations reasons wish to be seen making sales directly to a company based in the Middle East. *Id.* ¶ 51. To address this concern, Gap proposed that Gabana serve as an intermediary, such that Gap would on paper sell the OP inventory (and later the ISP merchandise) to Gabana, which would then simultaneously resell the merchandise to Roots. *Id.* Roots consented to this proposal – but only on the understanding that its purpose was primarily cosmetic and that it would not in any way deprive Roots of the benefit of the bargain it had negotiated with Gap.¹ *Id.* ¶ 52.

On May 13, 2003, Gap executed two agreements with Gabana to document its role as an intermediary. The agreements (“Gap-Gabana Agreements”) appointed Gabana as a non-exclusive distributor for OP merchandise (“OP Agreement”) and ISP merchandise (“ISP Agreement”). *Id.* ¶ 53. On September 1, 2004, Gap and Gabana executed a new ISP Agreement, which was largely identical to the original agreement, but extended its term. Roots was not a party to any of Gabana’s written agreements with Gap, and it was never shown a copy of the agreements before they were executed. *Id.* ¶ 55, 60 Neither Gap nor Gabana had any authority, express or implied, to bind

¹ Roots’ previous allegation that Roots acted “in effect” as Gabana’s “sub-distributor,” SAC ¶ 38, does not contradict the allegation that Gabana functioned purely as an intermediary. Roots has always alleged that it obtained the right to sell Gap products directly from Gap, and that all the merchandise it purchased pursuant to the agreement was shipped directly from Gap to Roots’ warehouse. Thus, Roots’ allegations have consistently shown that Gabana’s actual function was merely to serve as an “intermediary.”

1 Roots to any agreement that would have the effect of superseding, limiting, or otherwise
2 prejudicing the rights Roots obtained under its own contract with Gap.² *Id.* ¶ 56.

3 The Gap-Gabana Agreements authorized Gabana to purchase OP and ISP goods and resell
4 them to approved retail companies. *Id.* ¶ 62. Gap approved Roots as an authorized retailer of OP
5 and ISP merchandise and confirmed that, as an authorized retailer, it would have the right to sell
6 Gap merchandise in its own retail stores in Qatar and to other approved retailers. *Id.* ¶ 64.

7 Roots purchased the OP inventory by means of back-to-back wire transfers and letters of
8 credit through which Roots transferred the funds to Gabana and Gabana simultaneously sent the
9 same amount to Gap. *Id.* ¶¶ 69-70. Gap then shipped the inventory directly to Roots' warehouse
10 in Dubai. *Id.* ¶¶ 67, 71. Pursuant to an arrangement devised by Gap, Gap similarly sold first-line
11 merchandise to Gabana under the ISP Agreement, and Gabana simultaneously re-sold all the
12 merchandise – whether intended for distribution in Qatar or elsewhere – to Roots by means of a
13 back-to-back letter of credit. *Id.* ¶ 65. Gap shipped all the ISP merchandise directly to Roots'
14 warehouse, recognizing that Roots would send the goods to its own stores in Qatar, and to retailers
15 in other territories. *Id.* Clearly, in Gap's view, nothing in the Gap-Gabana Agreements precluded
16 Roots from reselling Gap ISP merchandise to other retailers. Indeed, in May, 2005, a Gap
17 executive confirmed in writing Gap's understanding that Roots had the right to re-sell Gap
18 merchandise to other Gap-approved retailers. *Id.* ¶ 64.

19 At Gap's request, Roots representatives traveled throughout the Middle East and North
20 Africa, touring various potential markets and meeting with scores of local retailers. *Id.* ¶ 6. In the
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22 ² Gap contends that these allegations are inconsistent with allegations in Roots' prior
23 complaint that (a) Gabana's principal attended certain negotiation sessions with Gap on Roots'
24 behalf, and (b) that Roots was a third-party beneficiary of the agreement. Defs. Mem. at 3, 5.
25 There is no inconsistency. Even if Larsen played a role in the negotiations on Roots' behalf, it
26 does not follow that he had unlimited authority to later extinguish Roots' oral contract rights by
27 entering into a separate agreement to which Roots was not a party. Roots' previous allegation that
28 it was a third-party beneficiary of the Gap-Gabana Agreements was a legal conclusion, not a
factual allegation, and the Court has rejected that legal theory. *See Comer v. Micor, Inc.*, 436 F.3d
1098, 1102 (9th Cir. 2006) (a party "cannot be bound to the terms of a contract [it] is not . . .
entitled to enforce").

1 Spring of 2004, Roots began selling Gap OP and ISP merchandise through its own retail stores in
 2 Qatar, and to another retailer in the UAE. *Id.* ¶¶ 82-87. Although these initial stores were
 3 successful, Gap began to stall in approving new retailers and territories in which Roots could sell.
 4 Gap led Roots to believe that it was not repudiating the parties’ oral contract, but only managing
 5 the pace at which Roots expanded its operations in light of sales returns. *Id.* ¶¶ 81-89.

6 On August 10, 2005, Gap terminated the ISP Agreement with Gabana. *Id.* ¶ 102. Because
 7 Gap had provided the ISP merchandise for Roots’ retail stores (and those of its retail partners in the
 8 UAE) solely through Gabana, the termination threatened to cut off Roots’ access to the first-line
 9 Gap goods necessary to run the stores. *Id.* ¶ 103. Roots attempted to negotiate a business
 10 resolution, but at the same time informed Gap that it had retained a U.S. law firm to assess Roots’
 11 claims against Gap. *Id.* ¶ 105. In response, Gap entreated Roots to refrain from filing a lawsuit,
 12 assuring Roots that a lawsuit was “unnecessary,” as Gap would continue to do business directly
 13 with Roots – without Gabana. *Id.* In reasonable reliance on these representations, Roots refrained
 14 from commencing a lawsuit, and instead engaged in numerous discussions and email exchanges
 15 concerning specific business proposals. *Id.* ¶ 107. These discussions continued until June 2007,
 16 when it became clear that Gap had no intention of fulfilling its contractual obligation to
 17 compensate Roots for its investment in the OP. *Id.* ¶ 108. Accordingly, Roots filed this lawsuit on
 18 June 26, 2007.

19 ARGUMENT

20 I. The TAC States A Claim For Breach of An Oral Contract (Counts 1 and 2)

21 Gap argues that Roots’ oral contract claims are barred by the parol evidence rule. This
 22 argument fails for three reasons: (1) the rule is inapplicable in this case; (2) the oral contracts
 23 alleged in the TAC are consistent with the Gap-Gabana Agreements; and (3) Gap is estopped from
 24 advancing any interpretation of the Gap-Gabana Agreements that is inconsistent with Roots’ rights.

25 A. The Parol Evidence Rule Has No Application In This Case.

26 Gap’s argument rests on the assumption that the parol evidence rule applies in any action
 27 involving a non-party to a written agreement. However, whether and under what circumstances the
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1 parol evidence rule can be invoked by or against a non-party is an unresolved question under
2 California law. *See, e.g., Hess v. Ford Motor Co.*, 27 Cal. 4th 516, 526 n.2 (2002) (declining to
3 “reach the issue of whether a stranger to the contract may invoke the parol evidence rule”). Some
4 cases suggest that the rule precludes a non-party from introducing extrinsic evidence to alter or
5 vary the terms of a written agreement. But Roots does not seek to alter, interpret, or enforce the
6 Gap-Gabana Agreements; it brings a claim for breach of a separate oral contract between Roots and
7 Gap. Gap cannot cite a single case that would permit it to avoid obligations under a pre-existing
8 oral contract by the simple expedient of entering into a written contract with a third party on the
9 same subject matter.

10 The principal case applying the parol evidence rule to a non-party, *Kern County Water*
11 *Agency v. Belridge Water Storage Dist.*, 18 Cal. App. 4th 77 (1993), is readily distinguishable and
12 does not support the application of the doctrine in this action. In *Kern County*, a county water
13 agency brought a declaratory relief action to resolve a dispute with its 14 member water districts
14 concerning an amendment to a master water supply contract between the agency and the state,
15 which was incorporated by reference in agreements between the agency and each of the member
16 districts.

17 On the basis of the parol evidence rule, the trial court sustained the objection of two
18 districts to extrinsic evidence offered by the other districts as to the parties’ intent with respect to
19 the amendment. The Court of Appeals affirmed, holding that, although the extrinsic evidence that
20 the two districts sought to exclude technically pertained to contracts between other districts and the
21 agency, “the facts of this case strongly support the power of any member district to invoke the
22 parol evidence rule.” *Id.* at 87. In so finding, the Court noted that the amendment as to which the
23 two districts sought to introduce extrinsic evidence was incorporated by reference into the
24 agreements of all of the member districts. As a result, “[t]he trial court could not interpret one
25 member district’s contract without affecting the contractual rights and obligations of all parties.”
26 *Id.* Here, by contrast, Roots is not a party to the Gap-Gabana agreements; the agreements are not
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1 identical to the agreement between Roots and Gap; and admitting evidence of Roots' oral
2 agreement with Gap will not affect the interpretation of the Gap-Gabana agreements.

3 While this alone renders *Kern* readily distinguishable, the Court also relied heavily on the
4 *express "interrelationship of the contracts* between the member districts and [the water agency]"
5 in reaching its decision. *Id.* (emphasis added). The Court noted that "[t]here are notice
6 requirements to the contracting member unit and *all other* member districts." *Id.* Because the
7 agreements at issue expressly recognized "the *overlapping interests of the various districts* in
8 others' contracts," there was a sufficient basis for allowing each to rely on the parol evidence rule .
9 . . ." *Id.* (emphasis added). Here, by contrast, Roots did not control the negotiation of the written
10 contract between Gap and Gabana, and the Gap-Gabana agreement does not expressly reference
11 the oral agreement between Roots and Gap. Roots was not shown copies of any of the Gap-
12 Gabana agreements before they were executed; it was not even informed that the September 1,
13 2004 ISP agreement had been executed. TAC ¶¶ 55, 60. Roots was an outsider to the contracts
14 between Gap and Gabana, whose interests were entirely independent from those of Gap, or
15 Gabana. As such, the facts of this case are not analogous to those of *Kern County*, where the
16 unique interrelationship of the parties warranted a narrow application of the parol evidence rule to
17 non-parties with identical contracts.

18 Finally, there was no danger in *Kern County* that application of the rule would extinguish
19 the preexisting contract rights of any party. Unlike here, the parties that sought to exclude extrinsic
20 evidence concerning the meaning of the water district contracts were not doing so in an attempt to
21 extinguish their separate contractual obligations to other parties under different agreements.

22 B. The Parol Evidence Rule Is Inapposite Because The Gap-Gabana
23 Agreements Are Consistent With Gap's Oral Agreement With Roots.

24 The parol evidence rule is inapplicable for the additional reason that Roots' oral contract
25 claims are fully consistent with the Gap-Gabana Agreements. First, Roots alleges that Gap's
26 obligations under its oral contracts included permitting Roots to sell first-line Gap apparel in its
27 own retail stores. Gap's termination of the ISP Agreement – and its subsequent failure to provide
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1 first-line merchandise to Roots by other means – constituted a breach of this contractual obligation.
 2 TAC ¶¶ 114-116, 121-123. Gap does not – and cannot – suggest that that this part of Roots’ oral
 3 contract claim is in any way inconsistent with the Gap-Gabana agreements. At the very least, Roots
 4 should be permitted to assert claims for breach of its contract right to be a retailer of Gap products
 5 in Qatar.

6 As for Roots’ claim that it had the contractual right to resell OP and ISP merchandise
 7 outside of Qatar, Gap points to no provision of the Gap-Gabana agreements that expressly
 8 prohibited Roots, as an authorized retailer, from reselling such merchandise to other Gap-approved
 9 retailers for sale in authorized retail stores. Gap’s two year course of performance under the
 10 agreements – and the admission of its own executives, who acknowledged Roots’ right to sell to
 11 other retailers, TAC ¶ 64 – demonstrate that Gap understood Roots’ role as a retailer to include not
 12 only sales to consumers but also sales to other retailers.

13 Gap dismisses Roots’ allegations concerning the parties’ “understanding” of the terms of
 14 the Gap-Gabana agreements, relying instead on the dictionary definitions of “retailer” and
 15 “distributor.” Defs. Mem. at 6, 8. However, “[t]he conduct of the parties after execution of the
 16 contract and before any controversy has arisen as to its effect affords the most reliable evidence of
 17 the parties’ intentions.” *Employers Reinsur. Co. v. Superior Ct.*, __ Cal. Rptr. 3d __, 2008 WL
 18 906644, at *7 (Apr. 3, 2008) (emphasis added); *accord Nanakuli Paving and Rock Co. v. Shell Oil*
 19 *Co.*, 644 F.2d 772, 785 (9th Cir. 1981) (“actual performance of a contract” is “the most relevant
 20 evidence of how the parties interpreted the terms of that contract.”) (emphasis added).

21 The parol evidence rule permits terms of an integrated agreement to “be explained . . . by
 22 course of performance.” Code Civ. P. § 1856(c). Indeed, “[w]here an agreement involves repeated
 23 occasions for performance by either party with knowledge of the nature of the performance and
 24 opportunity for objection to it by the other, any course of performance accepted or acquiesced in
 25 without objection is given great weight in the interpretation of the agreement.” *United States v.*
 26 *Floyd*, 1 F.3d 867, 872 (9th Cir. 1993) (citation omitted). Here, not only did Gap implicitly
 27 acknowledge through its course of dealing that Roots’ sale of OP and ISP merchandise to other
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1 approved retailers was consistent with the terms of the Gap-Gabana agreements, it expressly
 2 confirmed in writing that Roots' role as an retailer of OP inventory included re-selling merchandise
 3 to other retailers. Because the TAC alleges an interpretation of the Gap-Gabana agreements that is
 4 consistent with the terms of Roots' oral contracts, the parol evidence rule is no barrier to Roots'
 5 claims.

6 C. Gap Is Estopped From Asserting An Interpretation Of The Gap-Gabana
 7 Agreements that Prejudices Roots' Rights.

8 Even if the Gap-Gabana contracts could be interpreted in a manner prejudicial to Roots'
 9 rights, Gap is estopped from asserting that interpretation. "Whenever a party has, by his own
 10 statement or conduct, intentionally and deliberately led another to believe a particular thing true
 11 and to act upon such belief, he is not, in any litigation arising out of such statement or conduct,
 12 permitted to contradict it." Cal. Evid. Code § 623. By its conduct and affirmative representations
 13 over the course of a two-year business relationship, Gap deliberately induced Roots to expend
 14 considerable money and resources in reliance on the promise that Roots was entitled to purchase
 15 first-line Gap merchandise from Gap (through Gabana) for re-sale (1) directly to consumers in
 16 Roots own retail stores in Qatar and (2) to other Gap-approved retailers in other territories. Thus,
 17 even if the Gap-Gabana agreements somehow precluded Roots from re-selling Gap apparel to other
 18 retailers – and as explained above, they did not – the doctrine of estoppel would bar Gap from
 19 enforcing this prohibition. *See Wagner v. Glendale Adventist Med. Ctr.*, 216 Cal. App. 3d 1379,
 20 1388 (1989) ("When one party has, through oral representations and conduct or custom,
 21 subsequently behaved in a manner antithetical to one or more terms of an express written contract,
 22 he or she has induced the other party to rely on the representations and conduct or custom. In that
 23 circumstance, it would be equally inequitable to deny the relying party the benefit of the other
 24 party's apparent modification of the written contract.").³

25 _____
 26 ³ Moreover, to the extent the Gap-Gabana Agreements can be interpreted to prohibit
 27 Roots' resale of Gap merchandise to other retailers, Gap's entry into the agreements and its
 28 subsequent decision to enforce them in a manner prejudicing Roots' rights are themselves
 actionable as breaches of (a) Gap's express oral agreement to allow Roots to sell OP and ISP
 merchandise, and (b) the covenant of good faith and fair dealing implied in Gap's agreement with

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2 **II. The TAC States A Claim for Breach of the Covenant of Good Faith and Fair Dealing (Count Three).**

3 Gap's argument that Roots "waived" its claim for breach of the covenant of good faith and
4 fair dealing claim by failing to assert the claim in a separate count in its SAC, Defs. Mot. at 8-9,
5 fails both on the facts and the law.

6 First, Roots' did not "drop" the breach of the covenant of good faith and fair dealing from
7 the SAC. California law automatically "implies a covenant of good faith and fair dealing in every
8 contract," including the oral contracts alleged in the SAC. *Mundy v. Household Fin. Corp.*, 885
9 F.2d 542, 544 (9th Cir. 1989). Among the breaches of contract identified in the SAC was Gap's
10 "[f]ailure to *consider in good faith* and/or approve local ISP retailers identified by Roots." SAC
11 ¶¶ 85, 90 (emphasis added). Thus, Roots continued to invoke the implied covenant of good faith
12 and fair dealing in the complaint. That the SAC did not have a separate count for breach of the
13 implied covenant is of no moment, as federal pleading rules require only that the complaint provide
14 "fair notice of the general nature and type of the pleader's claim." *See Grier v. Brown*, 230 F.
15 Supp. 2d 1108, 1111 (N.D. Cal. 2002).

16 Moreover, the cases Gap cites in support of its "waiver" theory are distinguishable. Defs.
17 Mem. at 8. Those decisions held that the plaintiff waived its right to *appeal* the dismissal of a
18 claim by failing to reassert the claim in an amended complaint. Gap cites no case that precludes a
19 plaintiff from asserting the claim in a subsequent amended complaint. Gap also faults Roots for
20 failing to file a separate motion for leave to replead the good faith and fair dealing claim. Even if a
21 motion were required, Gap offers no reason why it should not be granted. The Federal Rules
22 provide that leave to amend a complaint should be "freely given," Fed. R. Civ. P. 15(a), and in the
23 Ninth Circuit this "[t]his policy is . . . applied with extreme liberality." *Eminence Capital, LLC v.*
24 *Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (citation omitted). Since Gap can claim no
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26

27 Roots, which bars Gap from taking any action to deprive Roots of the benefits of the agreement.
28 TAC ¶¶ 66, 118, 125.

legitimate prejudice from the amendment, there is no legitimate basis to deny Roots the right to plead a claim for breach of the covenant of good faith and fair dealing. *See id.* at 1052.

III. The TAC States Two Separate Claims for “Unfair” and “Unlawful” Business Practices Under Cal. Bus. & Prof. Code § 17200 (Counts Four and Five).

Roots alleges two separate claims under California’s Unfair Competition Law (“UCL”), Bus. & Prof. Code § 17200 *et seq.*, for “unfair” and “unlawful” business practices. TAC ¶¶ 134-140, 141-45. Gap’s sole argument concerning these counts – that both claims must be dismissed if Roots’ other causes of action fail – is flatly inconsistent with established law. *See* Defs. Mem. at 9.

Unlike the “unlawful” prong of the UCL, which, “borrows violations of other laws,” *Lazar v. Hertz Corp.*, 69 Cal. App. 4th 1494, 1505 (1999), a claim for “unfair” business practices does not require any underlying predicate claim. *See, e.g., Progressive W. Ins. Co. v. Superior Court*, 135 Cal. App. 4th 263, 286 (2005) (upholding 17200 claim for “unfair” business practices notwithstanding the fact that complaint did not state a claim for breach of contract, or breach of the implied covenant of good faith and fair dealing). To the contrary, “a practice may be deemed unfair even if not specifically proscribed by some other law.” *Blennis v. Hewlett-Packard Co.*, 2008 WL 818526, at *6 (N.D. Cal. Mar. 25, 2008) (citing *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999)); *see also People ex rel. Renne v. Servantes*, 86 Cal. App. 4th 1081, 1095 (2001) (statute “give[s] the court maximum discretion to control whatever new schemes may be contrived, even though they are not yet forbidden by law.”).

In determining whether a particular practice is “unfair,” California courts weigh “the impact [of the conduct] on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer.” *Smith v. State Farm Mut. Auto. Ins. Co.*, 93 Cal. App. 4th 700, 718 (2001).⁴ The TAC pleads a claim for unfair business practices under this standard: Gap induced Roots to purchase the OP inventory for an above-market price, and to expend money and resources

⁴ In its first motion to dismiss (at p. 12), Gap argued that a claim for unfair business practices must be “tethered” to a “specific constitutional, statutory or regulatory provision.” However, this standard – articulated by the California Supreme Court in *Cal-Tech Communications*, 20 Cal. 4th at 186-87 – “applies only to cases between direct competitors, not all ‘commercial’ cases.” *See Nat’l Rural Telecomm’n v. DIRECTTV, Inc.*, 319 F. Supp. 2d 1059, 1075 (C.D. Cal. 2003) (collecting cases).

liquidating the inventory and developing a retail network for Gap products in the Middle East, but then denied Roots the benefit of the bargain by terminating Roots' ability to sell first-line Gap merchandise. TAC ¶¶ 41-104. Moreover, Gap had no legitimate justification for its conduct: Its apparent motivation for inducing Roots to purchase the OP inventory was to shift title to the outdated merchandise in order to keep a liability off its financial statements, TAC ¶¶ 29-30, 47; Gap terminated Roots' right to sell first-line Gap merchandise in order to arrogate to itself the benefit of Roots' efforts to develop a retail market in the Middle East. TAC ¶¶ 109-112. Roots' unfair business practices claim clearly raises issues of fact that cannot be resolved on a motion to dismiss. *See McKell v. Washington Mut., Inc.*, 142 Cal. App. 4th 1457, 1473 (2006) ("The determination whether [an alleged practice] is unfair is one of fact which requires a review of the evidence from both parties. . . . It thus cannot usually be made on demurrer.").

IV. The TAC States A Claim For Common Law Fraud (Count Six)

The parol evidence rule does not preclude Roots' fraud claim based on misrepresentations made prior to the execution of the second Gap-Gabana ISP Agreement on September 1, 2004. Although a party to a contract may not assert a fraud claim based on "prior or contemporaneous statements at variance with the terms of a written integrated agreement," 1/28/08 Order at 7, Roots is not a party to the Gap-Gabana agreements. Accordingly, while Gabana may be barred from asserting fraud claims at variance with the terms of its written agreement with Gap, Roots is not. To hold otherwise would allow any party to avoid liability for fraudulent promises to a party by unilaterally executing a contract on the same subject matter with a different party.

Moreover, as explained above, Gap's fraudulent promises to grant Roots the right to sell first line Gap merchandise directly to consumers in its own retail stores in Qatar and to Gap-approved retailers in other territories were not inconsistent with the terms of the written agreements between Gap and Gabana. *See supra* at 5-7. Thus, even if the parol evidence rule applied, it would not bar Roots' fraud claim.

In any event, the TAC enumerates four false representations that post-date the September 1, 2004 Agreement, and thus cannot possibly be barred by the parol evidence rule. The allegation

that Gap “falsely stated that it would allow Roots to expand the ISP business to Saudi Arabia” in January 2005, does not, as Gap suggests, merely “generalize” from more specific allegations that this court determined were “puffery.” Defs. Mem. at 9. This is a separate, concrete misrepresentation concerning Gap’s business plan for a specific product and market that is actionable as fraud.

Gap also contends that Roots does not allege reasonable reliance on the false statements that post-date September 1, 2004. But the TAC does allege that Roots relied on these representations by, *inter alia*, preparing additional business proposals for Saudi Arabia and the UAE, TAC ¶¶ 94-95; preparing a “detailed business plan” for a franchise relationship with Gap, *id.* ¶ 101; and sending “its representatives to numerous countries, including Morocco, Tunisia, Egypt, and Saudi Arabia to investigate the market for a Gap franchise in these territories.” *Id.*

Finally, Gap argues that Roots “is not entitled to tort damages” because its claims sound in contract. Defs. Mem. at 10-11. None of the cases Gap cites supports this argument, particularly at the pleading stage.⁵ Indeed, one of Gap’s cases, *Conrad v. Bank of Am.*, 45 Cal. App. 4th 133, 157 (1996) acknowledges that a plaintiff can establish a claim “based upon the alleged failure to perform a promise” where “the promisor did not intend to perform at the time the promise was made.” This is precisely what Roots alleges. *See, e.g.*, TAC ¶ 48 (“Gap never intended to fulfill these promises.”).

V. **The TAC States A Claim For Promissory Estoppel, Quantum Meruit, and Quasi-Contract/Restitution (Counts Seven, Eight, and Nine).**

A. Roots’ Promissory Estoppel and Quasi-Contract Claims Were Timely Filed.

Gap fundamentally misconstrues the events that trigger the running of the limitations period for Roots’ promissory estoppel and quasi-contract claims. “[A] statute of limitations begins to run no earlier than upon accrual of the cause of action, which is upon the occurrence of the last essential element.” *Chambers v. Kay*, 106 Cal. Rptr. 2d 702, 719 (2001), *aff’d* 29 Cal. 4th 142

⁵ *JRS Prods. Inc v. Matsushita Elec. Corp of Am.*, 115 Cal. App. 4th 168 (2004) was an appeal from a jury verdict after trial – not a motion to dismiss – and the claim at issue was for tortious interference with contract, not fraud. In *Santandrea v. Siltec Corp.*, 56 Cal. App. 3d 525, 529 (1976), the court found on summary judgment that “[t]here was no triable issue in regard to fraud” because “[t]he record negates any representations that were relied upon by appellant.”

(2002); *see also J.W. Van Hook v. Southern Cal. Waiters Alliance*, Local 17, 158 Cal. App. 2d 556, 565 (1958) (claim does not accrue until “the moment when the party owning it is entitled to begin and prosecute an action thereon”). Roots timely filed its promissory estoppel and quasi-contract claims within two years of the date the claims accrued.

Gap’s contention that the promissory estoppel claim is time-barred to the extent it is based on promises made prior to June 25, 2005, Defs. Mem. at 11, incorrectly assumes that a promissory estoppel claim accrues immediately when the promise is made. But a promise is only one element of the claim. The plaintiff must also plead: (1) reasonable and foreseeable reliance on the promise; and (2) a resulting injury. *See J.W. Van Hook*, 158 Cal. App. 2d at 570. Roots’ promissory estoppel claim did not accrue when Gap *made* its promises, but rather when Gap *breached* the promises, causing injury to Roots. *See Chambers*, 106 Cal. Rptr. 2d at 719 (citing *Budd v. Nixon* 6 Cal. 3d 195, 200-201 (1971)) (“Until the defendant’s conduct causes damages to the plaintiff, no cause of action has been generated and the period of limitations is not triggered.”); *compare City of Cheny v. Gardner*, 113 Wash. App. 1056 (2002) (under law of Washington state, statute of limitations for promissory estoppel claim “begins to run at the time of the breach, not when the promise was made”). Thus, the statute of limitations for Roots’ promissory estoppel claim began to run no earlier than August 10, 2005 – the date that Gap wrongfully terminated its ISP agreement with Gabana and ceased providing ISP merchandise to Roots. *See* TAC ¶¶ 102-03.

“[A] suit for breach of an implied contract, which is the essence of a quantum meruit claim,” likewise “accrues at the time of the breach.” *Kramer v. Thomas*, 2006 WL 4729242, at *14 (C.D. Cal. Sept. 28, 2006). As for the restitution claim, although Gap received various benefits at Roots’ expense throughout the course of their business relationship – beginning with “the \$6 million Roots paid to purchase the OP inventory,” TAC ¶ 166 – Gap’s obligation to make restitution was not triggered until “the circumstances [were] such that . . . it [was] *unjust* for [Gap] to retain [the benefits].” *McBride v. Boughton*, 123 Cal. App. 4th 379, 389 (2001) (emphasis in original). Thus, Root’s quantum meruit and quasi-contract/restitution claims likewise did not accrue before Gap cut off Roots’ supply of first-line Gap merchandise in August, 2005.

B. Gap Is Equitably Estopped From Invoking The Statute of Limitations Because It Induced Roots To Refrain From Filing Suit.

Gap's statute of limitations defense also fails on the ground of estoppel. Following the termination of the ISP Agreement, Gap "urged Roots to refrain from filing suit" by assuring Roots that "Gap would continue to do business directly with Roots – without Gabana." TAC ¶ 105. Specifically, Gap promised that it would grant Roots franchise rights "at a minimum . . . in Qatar where it already operated retail stores." *Id.* ¶ 106. In reliance on these promises, "Roots refrained from commencing a lawsuit. . . ." *Id.* ¶ 107. Where, as here, "delay in commencing an action is induced by the conduct of the defendant, it cannot be availed of by him as a defense." *Lantzy v. Centex Homes*, 31 Cal. 4th 363, 384 (2003).

Gap asserts that there is no basis for an estoppel because Gap's promises did not "bear[] on the necessity of bringing a timely suit." Defs. Mem. at 13 (citing *Latzny*, 31 Cal. 4th at 384 n.18). However, Gap's attempt to limit the equitable estoppel doctrine to circumstances where the defendant gives assurances that it will not rely on the statute of limitations, Defs. Mem. at 14, has no support in the case law. In *Latzny*, the California Supreme Court held that a defendant who represents that "actionable damage has been or will be repaired, thus making it unnecessary to sue" is equitably estopped from invoking the statute of limitations. *Id.* at 384 (emphasis added); *accord Prudential-LMI Com. Ins. v. Superior Ct.*, 51 Cal. 3d 674, 690 (1990) ("an insurer that leads its insured to believe that an amicable adjustment of the claim will be made, thus delaying the insured's suit, will be estopped from asserting a limitation defense"). This is precisely what Roots alleges.⁶ The TAC, therefore, pleads facts sufficient to estop Gap from invoking the statute of

⁶ Gap's other attempts to avoid the equitable estoppel doctrine also miss the mark. The fact that Roots does not allege that Gap "actively concealed information that would allow Roots to maintain a claim successfully," Defs. Mem. at 14, is irrelevant. Fraudulent concealment of material facts is a basis for applying the separate doctrine of "equitable tolling," which Roots does not rely on here. *See FNB Mortg. Corp. v. Pacific Gen. Group*, 76 Cal. App. 4th 1116, 1133 (1999). "Actual fraud . . . bad, faith, or an intent to mislead are not essential to create [] an estoppel." *J.W. Van Hook*, 158 Cal. App. 2d at 568. Gap's argument that Roots does not allege any "fraudulent conduct 'above and beyond the wrongdoing upon which the plaintiff's claim is filed,'" Defs. Mem. at 13-14, fails for the same reason. Moreover, the facts supporting the estoppel are distinct from those that give rise to Roots' substantive claims: the claims themselves concern Gap's conduct from approximately May, 2003 (when Gap fraudulently induced Roots to purchase the OP inventory) to August, 2005 (when Gap terminated Roots' right to sell first-line Gap

1 limitations. *See Shaffer v. Debbas*, 17 Cal. App. 4th 33, 43 (1993) (“Whether an estoppel exists . . .
2 is a question of fact and not of law.”) (citation omitted).

3 C. The TAC States A Claim For Promissory Estoppel.

4 Roots’ promissory estoppel claim (Count Seven) identifies a non-exhaustive list of seven
5 promises Gap made to Roots. TAC ¶ 153. Gap does not dispute that the first six of these promises
6 are actionable, but claims that the seventh – “Gap reiterated its promise to make Roots a franchisee
7 in Qatar, and also promised to expand the territories in which Roots could sell the remaining OP
8 inventory” – is not sufficiently “clear and unambiguous” to state a claim. Defs. Mem. at 12. The
9 cases Gap cites in support of this argument are clearly distinguishable. In *Aguilar v. Int’l*
10 *Longshoremen’s Union*, 966 F.2d 443, 446 (9th Cir. 1992), the court held that a union’s
11 representation to applicants that “job experience would be considered did not constitute a clear and
12 definite promise that previous . . . experience would be the determinative factor. . . .” The court’s
13 holding that the plaintiffs could not “transform” their “inferences . . . into an enforceable promise,”
14 *id.*, has no application to Roots’ claim. The promissory estoppel claim in *Lange v. TIG Ins. Co.*, 68
15 Cal. App. 4th 1179 (1998), was similarly based on an incorrect inference the plaintiff insurance
16 brokers made concerning the effective date of a notice terminating their right to sell TIG insurance
17 policies. Finally, the defendant’s vague promise in *B&O Mfg., Inc. v. Home Depot U.S.A., Inc.*,
18 2007 U.S. Dist. LEXIS 83998, at *16-17 (N.D. Cal. Nov. 1, 2007), “to provide substantial
19 quantities of future business” is far less definite and certain than Gap’s promise to grant Roots
20 franchise rights for a specific product in a specified territory.⁷

21 D. The TAC States A Claim For Quasi-Contract/Restitution (Count Nine).

22 The Court dismissed Roots’ unjust enrichment claim on the ground that “[t]here is no cause
23

24 merchandise). Gap is estopped from asserting the statute of limitations based on these subsequent
25 promises to make Roots whole through a future business relationship.

26 Gap’s suggestion that Roots does not allege any breach of the promises (i) “to make
27 Roots a franchise in Qatar,” and (ii) to expand Roots’ OP territories, Defs. Mem. at 12, is meritless,
28 as the complaint clearly alleges that Gap failed to fulfill those promises. *See* TAC ¶ 106-108.
Finally, Gap’s assertion that “Roots cannot have reasonably relied on the reiteration of an alleged
promise that Gap already had breached” at best raises an issue of fact that cannot be resolved on a
motion to dismiss. *See Gray v. Don Miller & Assocs., Inc.*, 35 Cal. 3d 498, 503 (1984) (“Whether
reliance is justified is a question of fact . . .”).

of action for unjust enrichment. Rather, unjust enrichment is a basis for obtaining restitution based on quasi-contract. . . .” 1/28/08 Order at 11. Consistent with that determination, Roots re-pled its unjust enrichment claim as a claim for quasi-contract/restitution. *See Nordberg v. Trilegiant Corp.*, 445 F. Supp. 2d 1082, 1100 (N.D. Cal. 2006) (claims “labeled ‘unjust enrichment’ . . . could be understood as claims for restitution”). Gap does not deny that restitution is a cause of action, or that TAC pleads the elements of the claim. Thus, the motion to dismiss Count Nine should be denied.

E. There Are No Written Agreements Covering The Same Subject Matter As Roots’ Quasi-Contract and Promissory Estoppel Claims.

Gap argues that Roots cannot assert quasi-contractual claims because “a written contract covers the same issue.” Defs. Mem. at 19. This is incorrect. There is no written contract governing the rights Roots seeks to enforce in this action. Roots was not a party to the Gap-Gabana agreements, and it claims no rights under those agreements. The agreement between Gabana and Roots that Gap references is entirely irrelevant. That agreement concerned Roots’ prior purchase of Gap excess inventory, in May 2002, a transaction that was entirely unrelated to those at issue in this case. The other Gabana-Roots “agreement” was a letter of understanding, executed in May 2003, contemplating agreements that were never actually executed.⁸

CONCLUSION

The Court should deny Defendants’ motion to dismiss Roots’ Third Amended Complaint.

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 BRADLEY J. NASH (*pro hac vice*)

⁸ That the complaint seeks damages for Gap’s breaches of the oral contracts with Roots does not preclude Roots from pleading claims for equitable relief in the alternative. A complaint may “seek both an equitable remedy of estoppel and a legal remedy for breach of contract,” as the Federal Rules permit the pleading of “inconsistent legal theories.” *Mike Nelson Co., Inc. v. Hathaway*, 2005 WL 2179310, at *4 (E.D. Cal. Sept. 8, 2005) (citations omitted).